In The
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-5224

GEORGE R. THURSTON, Individually and on behalf of all others similarly situated,
Petitioners,

vs.

JOSEPH C. DEKLE, as Chairman, Civil Service Board, Jacksonville, Florida, and WILLIAM HALLOWES, ROGER WEST, DWIGHT BRADDY, BOYD JOLLY, CLARENCE SUGGS, WARREN E. THOMAS, Members of the Civil Service Board, Jacksonville, Florida, and JOHN VAN NESS, Director, Department of Housing and Urban Development,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Joseph C. Dekle, et al., respondents oppose the issuance of a Writ of Certiorari to the judgment of the United States Court of Appeals for the Fifth Circuit, as prayed for in the petition, and submit herewith their brief in opposition.

OPINION BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is reported as *Thurston v. Dekle*, 5th Cir. 1976, 531 F.d 1164.

QUESTION PRESENTED

WHETHER SUBJECT MATTER JURISDICTION EXISTS UNDER 28 U.S.C. §1343(3) AND 42 U.S.C. §1983 AGAINST INDIVIDUAL MEMBERS OF MUNICIPAL AGENCIES IN THEIR OFFICIAL CAPACITIES, FOR THE AWARD OF BACK PAY AND OF REINSTATEMENT OF EMPLOYEES DISCHARGED UNDER AN UNCONSTITUTIONAL CIVIL SERVICE REGULATION, WHERE THE BACK PAY WOULD OF NECESSITY BE FROM THE CITY TREASURY, AND ANY REINSTATEMENT COULD BE ORDERED BY SUCH OFFICIALS ONLY IN THEIR OFFICIAL CAPACITY.

STATEMENT OF THE CASE

Respondents accept the statement of the case contained in the petition for certiorari, except with the caveat that there is no showing this to be a class action petition. Petitioners, thus, should be changed to petitioner.

ARGUMENT

REASONS WHY WRIT SHOULD NOT BE GRANTED

1. LACK OF JURISDICTION.

A court of the United States does not have jurisdiction of an action brought under 28 U.S.C. §1343(3) and 42

U.S.C. §1983 against individual members of a municipal civil service board, solely in their official capacities, and the director of a municipal department, solely in his official capacity, for reinstatement and back pay.

Thurston claims jurisdiction is conferred upon this Court by virtue of 28 U.S.C. §1343(3) because of 42 U.S.C. §1983.

This Court has held on three separate occasions that a municipality is not a person under the above statute. *Monroe v. Pape*, 365 U.S. 167, 5 L.Ed.2d 492 (1961); *Egan v. City of Aurora*, 365 U.S. 514, 5 L.Ed.2d 741 (1961); and *City of Kenosha v. Bruno*, 412 U.S. 507, 93 S.Ct. 222, 37 L.Ed.2d 109 (1973).

In its most recent pronouncement, this Court held that a federal district court was without jurisdiction of an action brought against a municipality under 42 U.S.C. §1983.

It is clear, from long established decisions of this Court that the suit of Thurston is a suit against the City, although there are nominal individuals named defendants. In considering cases under the Eleventh Amendment to the United States Constitution, this Court has held on many occasions that the amendment applies to any suit brought in name against an officer of the state, when the state, though not named, is the real party against which relief is asked and the judgment will operate. *In re Ayers*, 123 U.S. 443, 8 S.Ct. 164 (1887), 31 L.Ed. 216; *Minnesota v. Hitchcock*, 185 U.S. 386, Minn. 1902, 22 S.Ct. 650, 46 L.Ed. 954. c.f. *Louisiana v. Jumel*, 107 U.S. 711, 2 S.Ct. 127, 27 L.Ed. 448 (1883).

From the foregoing, it should be obvious that plaintiff is seeking to do indirectly what he can not do directly.

Defendants are not suggesting that a prohibitory injunction cannot issue, even against a state officer. The law has too long been to the contrary. *Ex parte Young*, 209 U.S. 123, 228 S.Ct. 441 (1908), 52 L.Ed. 714.

When, however, the action is one, as here, seeking reinstatement and back pay, it falls clearly within the penumbra of the "real party in interest" rule.

There is a great similarity in an action against a state officer, in his official capacity, as being an action against a state, forbidden by the Eleventh Amendment to the Constitution of the United States; and a 42 U.S.C. §1983 action against a municipal officer, in his official capacity, as being, in reality, a suit against the City, over which the Court lacks jurisdiction when the plaintiff is seeking back pay.

This Court in its most recent decision on the matter--*Edelman v. Jordan*, 415 U.S. 651, 39 L.Ed.2d 662 (1974), re-enforces the long established "real party in interest" rule. This Court in quoting from *Ford Motor Co. v. Department of Treasury*, 323 U.S.459, 89 L.Ed. 389 (1945) said:

> "When the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants."
>
> 415 U.S. at 663
>
> • • •
>
> "Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."
>
> 415 U.S. at 663

No suggestion is made herein that a municipality has eleventh amendment protection, however, it is argued that if in reality the action is against a municipality, albeit a public officer, in his official capacity, is a nominal party, the same rules of construction apply. For, as stated by the Court in *Edelman*,

> "These funds will obviously not be paid out of the pocket of petitioner Edelman."
>
> 415 U.S. 664

It would be an over simplification to say that, although a court of the United States would lack jurisdiction over the City under a §1983 action, *full* and *complete* relief could be granted by issuing a mandatory injunction against a municipal officer defendant, thus moving the City through him. As long ago as 1883, where it was sought affirmatively to compel the performance of a state's contract by mandamus against its officers requiring the application of funds in the State Treasury, and the collection of a specific tax authorized by law for the retirement of state lands, it was held to be a suit against the state. *Louisiana v. Jumel*, 107 U.S. 711.

As this Court makes clear in *Edelman v. Jordan, supra*, prohibitory injunctions are one thing--mandatory injunctions another.

2. PATENT CORRECTNESS OF DECISION OF WHICH REVIEW IS SOUGHT.

For the reasons stated in *Muzquiz v. City of San Antonio*, 5th Cir. 1975, 528 F.2d 499 (en banc), and *Monell v. Dept. of Soc. Serv. of City of New York*, 2d Cir. 1975, 532 F.2d 259, the decision of which review is sought, *Thurston v. Dekle*, 5th Cir. 1976, 531 F.2d 1254, is correct.

CONCLUSION

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

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FOR RESPONDENTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the Respondents Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been duly served upon PAUL C. DOYLE, ESQUIRE, and CAROLYN S. ZISSER, Duval County Legal Aid Association, 205 East Church Street, Jacksonville, Florida 32202, Attorneys for Petitioners, by United States mail, this 10 day of September, 1976.

William Lee Allen

Attorney